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Commercial Websites; Consumer Protection and Power Shifts

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Abstract

Internet forms a popular forum for information exchange between consumers, while online marketing has opened a range of new facilities for companies to promote and sell their products. This article aims to find out if consumer power has increased as a result of comparison websites and access to more information, or whether it has decreased because of unreliable companies and websites that misuse identity concealing features of the Internet. Main question is whether the autonomy of consumers, and therewith the position of power against producers, is restricted by advertisement techniques from producers who are using the Internet, and if there are causes for concern. Attention will be paid to current legislation on consumer protection and on unfair commercial practices, and implications of online shopping are discussed. Methods such as 'markufacturing' and comparison websites are discussed explicitly. Some focus points are provided as a first onset to further regulation in order to retain fair power positions between producers and consumers.

1. Introduction

The Internet has become widely accepted as a medium for communications and as a virtual market place. Consumers can easily compare goods, services and prices. Online shops can be connected to offline shops, but also complete online businesses were introduced.¹ Because of the lack of need for a company building, costs, and therewith prices, can be diminished, leading to profits for consumers.

However, online buying also enables profiling to a larger extent. Or at least, it is easier than in an offline environment. Concerns arise in relation to the limits of profiling and use of data. Is

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¹ M.Y. Schaub, *European Legal Aspects of E-Commerce*. Groningen, Europa Law Publishing 2004, p.11. She distinguishes between 'pure players' (only online) and 'click and mortar' e-commerce as related to traditional 'brick and mortar' shops.

it just some innocent kind of market research or does it end up in manipulation of human behaviour? And what might be the expected developments in this field as a result of technological innovations? Another point of interest is that influencing behaviour of customers is not necessarily related to profiling.

Our attention for this topic was caught by a comment, written by Roger Brownsword², on a presentation of Heidi Li Feldman³ on 'markufacturing'. This term is another expression for Market-Driven Manufacturing (MDM). This phenomenon refers to creating a market, or even a need for a product, before the product is launched. Most concerns, and also the context in which the term was used, are related to pharmaceuticals⁴. In his article, Brownsword gives the essence of the phenomenon: "Markufacturers will generate two mutually supportive messages: targets on the demand side will be persuaded not only that they have certain needs, but also that some particular product is right for them – a case, as it were, of "you *need* this" and "you *need* this"."⁵ In our opinion, this way of advertising and personal marketing is getting close to consumer manipulation.

This article aims to identify different gradations and methods of influencing customers' behaviour and to which extent new technologies, in particular the Internet, are facilitating this development. The main question is whether the autonomy of consumers, and therewith the position of power against producers, is restricted by advertisement techniques from producers who are using the Internet, and if there are causes for concern. In order to answer this question, there will first be a general overview of influencing customers' behaviour (2). Chapter 3 will discuss the influence of the Internet and give some practical examples of the online world. The subsequent chapter explores the implications thereof (4), followed by a

² R. Brownsword, *Causes for Concern and Causes of Action: A Comment on "Pushing Drugs"*, Washburn Law Journal, Volume 42, June 2003, p.601-614. Available at: <<http://washburnlaw.edu/wlj/42-3/articles/brownsword-roger2.pdf>>.

³ H.L. Feldman, *Pushing Drugs: Genomics and Genetics, the Pharmaceutical Industry, and the Law of Negligence*, presentation at the Ahrens Tort Symposium.

⁴ An example seems to be the rise of the pharmaceutical 'Viagra'; where it seems that a problem was created for which a solution was available. Impotence versus solution Viagra.

⁵ Supra note 2, p.602.

research on the scope of the term 'consumer' and initiatives for legislation (5). Chapter 6 shows the issues that need attention in relation to Internet marketing, before we will draw our conclusions in chapter 7.

2. Influencing behaviour

In order to discuss the different gradations of researching and influencing consumer behaviour and the effects thereof, it is important to make a distinction between two main factors first. Both factors are significantly relevant for the infringement upon personal behaviour. First factor is the amount of data being collected. The larger the amount, the more impact there can be on private life. However, the second factor is of even more importance and is necessary to judge the real infringement or influence on behaviour, namely the way the data are used by the producers. Depending on the way data are used, even a small amount of data being collected can result in a major influence, while a large amount of collected data can be less objectionable when used in a quite global way. We will show in practical terms how these data are collected and how data can be used for marketing purposes.

A first step is to gain knowledge about consumers in general, and, more specifically, about your customers. The most traditional method is market research based on questionnaires. These questionnaires can contain yes/no questions, where the consumer can choose a tick box or just answer 'yes' or 'no', but there can also be open questions, where a more detailed answer can be given. Besides, comparisons can be made, where a consumer has to choose between examples and has to motivate his choice. Even within this one instrument for research there are some gradations. However, it should be noted that nowadays even yes/no questions can be combined in such a way that detailed answers can be extracted from the results of a list of choices.

Another distinction that can be made is the distinction between information collected with knowledge of the customer and information collected without his knowledge. In the

abovementioned case of market research and questionnaires there is of course knowledge; the customer answers questions in relation to a research. However, there is also the possibility that the customer is completely unaware of data collection. For example, this is the case when so-called 'clicking-profiles' are made, based on the way people browse on websites, the search terms they use and the choices they make in menus on a particular website. In this respect Blok states that "[t]he Internet is a panopticon more perfect than Bentham's prison. The browsing conduct of the user of the Internet is perfectly transparent.⁶ Everything that happens in cyberspace is registered somewhere, for that is how the Internet works."⁷ With the large collection of data gathered in a certain period of time, detailed profiles can be made of customers. For example, "with the use of cookies, the surfing behaviour of a person on the Internet may easily be tracked."⁸ This profiling can be done for all customers together, a specific group of customers, or for each individual customer separately.

Beside the way the data are collected, it is of the utmost importance how these data are being used by the producers or suppliers. Based on the data, profiles can be made of behaviour and preferences of customers. These profiles can give an insight and some guidelines for marketing purposes. These marketing purposes and the different ways of using marketing techniques are the core issue of this article.

More traditional profiling techniques are used to make better, or perfect, divisions of shops. The place where a product can be found can influence the 'comfort rating' of a customer. And if a customer feels comfortable, he will buy more products. This also goes for the Internet. The design of a website is of significant influence to the customer's behaviour. The design is

⁶ He explains that for each communication registration of which packages are sent from where and where they are going to is needed. This means that there is always a computer or server where the 'click trail' of a client can be tracked.

⁷ P. Blok, "The Limits of Informational Self-determination" in: A. Vedder (Ed.) "Ethics and the Internet", Antwerpen/Groningen/Oxford: Intersentia 2001, pp.71-85, at p.71-72.

⁸ B. Custers, "The power of knowledge; Ethical, Legal, and Technological Aspects of Data Mining and Group Profiling in Epidemiology", Nijmegen, Wolf Legal Publishers 2004, p.24.

important for the professional appearance of a website⁹; structure and facilities to enable easy searching for products, as well as ‘pleasure features’¹⁰, fancy features on websites, containing games and other extra’s make the site more enjoyable. On the other hand, a website where it is difficult to find something, where links do not work or where the design looks non-professional will attract fewer customers to order goods or services. These findings are related to the trustworthiness of websites from the perspective of consumers.

3. Online marketing

In relation to trustworthiness and influencing customer’s behaviour, there are some specific characteristics of the Internet. Anonymity and pseudonymity offer new opportunities in reaching and steering customers. One phenomenon that has been widely accepted are websites where products and prices are compared, and where reviews and grades are given by consumers.¹¹ These comparisons and reviews can concern all kinds of products and services. Because consumers can share their own opinion with other consumers, they have become less dependent on suppliers, which were traditionally the main source of information on products. In general, it can be said that consumers have become more self-supporting. One important factor on these sites is that consumers are not obliged to reveal their whole identity. As a result, they will have fewer reservations to give their true personal opinion.

However, there are also drawbacks to these comparison sites. Because of the option to remain anonymous or to express your opinion using a pseudonym, the websites lack transparency. It is thus not clear if the opinions expressed can be considered valid information. This undermines the trustworthiness of the website. It appeared that on hotel and travel comparison websites, pseudonymity has been misused by companies to post positive reviews and

⁹ With professionalism we mean the professional look of a website; this concerns the well-organized appearance, lack of grammatical mistakes or language errors, and whether or not it seems like a professional undertaking.

¹⁰ F. Belanger et al. Trustworthiness in electronic commerce: the role of privacy, security, and site attributes, *Journal of Strategic Information Systems* 11 (2002), p.245-270.

¹¹ See for example: <<http://www.kelkoo.com>>.

comments in order to promote their own hotels.¹² The EU has the intention to prohibit these phoney promotions, because “consumers rely increasingly on online forums and message boards for impartial advice from other consumers on products and services.”¹³ Because there is no certainty or transparency on the identity of the person who posted the review, the reliability of these comparison websites is questionable. The most serious issue then is that there is lack of awareness from the consumer’s point of view on the possible false character of the identities.

The impact of message boards can be found in a research from Chavalier and Mayzlin¹⁴ at Yale’s Management School. They found that, when comparing the websites Amazon.com and BarnesandNoble.com, “the addition of new, favourable reviews at one site results in an increase in the sales of a book at that site relative to the other site.”¹⁵ By posting some positive comments the sales of products can be influenced positively. Besides, making selections in which reviews appear on the screen or do not appear at all, without mentioning numbers of reviews, will give a distorted impression of the quality of products. Another point of importance related to this is the lack of transparency on how average grades are determined. Referring to the hotel websites mentioned above, it is evident that positive reviews posted by the hotels themselves will also lead to higher grades.

Another interesting phenomenon, like mentioned in the introduction, is markufacturing. The Internet facilitates distribution of messages on a very large scale at the click of a mouse. If these messages are sent directly to certain consumers, who are, based on earlier purchases, selected beforehand as possible ‘targets’, it can be called ‘direct marketing’. The mentioned ‘markufacturing’ adds one extra dimension to direct marketing, namely that the need for a

¹² See for example: <<http://www.lawsof.com>> February 22 2007 or <http://news.com.com/2100-1038_3-6160075.html>.

¹³ See: <<http://www.out-law.com/page-7756>>.

¹⁴ J. Chevalier and D. Mayzlin, “The Effect of Word of Mouth on Sales: Online Book Reviews”, Yale School of Management, Working Paper Series ES #28 & MK #15, August 2003. Online available at: <<http://ssrn.com/abstract=432481>>.

¹⁵ E. Goldman, Consumer Reviews May Lift E-Commerce Conversion, Technology & Marketing Law Blog, October 19, 2006. Available at: <<http://blog.ericgoldman.org/cgi-bin/web/mt-t.cgi/183>>.

product is created before the product itself is offered. The Internet is extremely suitable for this kind of marketing. It is possible to reach large amounts of people and, therefore, it is also convenient to set up a hype or to create a need for products. Information is flowing and spread extremely fast over the Internet, meaning that starting a hype in a proper way will be sufficient to let it grow out to great proportions.

One of the more personal means of ‘advertisements’ is the use of Internet buddies or buddy bots. These online bots are a form of intelligent agents used by marketers and businesses to extract the personal preferences of individuals. These bots are deployed on the Internet and have virtual contact with individuals similarly to personal interaction. This type of “affective computing” as Kerr and Bornfreund call it¹⁶, is used “to generate avatars capable of garnering consumer trust.” Since the buddy bot is disguised as a ‘friend’ they seem to be much more capable to retrieve valuable personal information from individuals and to promote products on a ‘relationship’ basis. This can lead to misrepresentation of information, and can create a false sense of trust since the consumer might believe he is actually dealing with a person or believes that he is actually building a friendly relationship with the intelligent agent. It is not the interest of the consumer the bot is after, obviously, it is the interest of the business that is pursued. The customer is provided with the advice to use a specific product. For a specific product, the offered products are preferential ones; a company pays for the advertisement of the product through bots. Such preferred placement of products is not transparent for the consumer but has a major influence on the buying behaviour of the customer¹⁷. The ‘advice’ given to the customer is thus steered by the business(es) behind it, but yet it seems personal. This kind of marketing is quite invasive, since it lacks transparency and breathes a sense of ‘trust-relationship’ between a consumer and an intelligent agent.¹⁸

¹⁶ I. R. Kerr, M. Bornfreund, Buddy Bots: How Turing’s Fast Friends are Under-mining Consumer Privacy, Presence: Teleoperators and Virtual Environments Forthcoming, 2005.

¹⁷ *idem*, p. 7

¹⁸ A wide range of bots with different functions is already available. See for example <<http://www.mensmerk.nl/chatbots.html>> for a list of buddies in the Netherlands.

A new phenomenon is Twitter,¹⁹ a so-called microblog that only asks a single question; ‘What are you doing?’ You can answer this question by typing a text of no more than 140 characters and all your friends (and others) can always know what you are doing and where you are doing it. A similar feature is found in the MSN messenger service and the service the Dutch social network Hyves, yet none of these social networks (thus far) actively pursue the answer to the question. With the help of the microblog, it is much easier to create a market fit for the concept of markufactoring. As long as enough people answer to the question ‘what are you doing?’ with: ‘gaming @ PS3’ (Playstation’s newest game console), it is likely that the product PS3 becomes more popular. Hypes can thus be created with the use of such a Massive Multi-user Microblog. The virtual friendships, as with friendships with bots, thus become one of the most effective marketing tools available in the online environment. The microblog seems less invasive to the trust-relationship of the consumer since there is no personal marketing of the product. Nevertheless, the microblog can be misused, since the friends-network can also be businesses posing as new friends. Especially when certain age groups are targeted, this can be an effective marketing tool since an answer to the question ‘what are you doing’ is actively pursued. And again, the trust relationship build between consumer and the virtual friends in his network is abused.

4. Implications

It is not without reason that new online marketing techniques thrive or that consumers have more contact with these techniques. The scale of the Internet; worldwide, almost no limits (depending on the country you are living in of course) and widely accessible and the fact that the more common language is widely understood ensures that the customer has more companies and products to choose from. The consumer is no longer bound to his or her own city and country, but can acquire products from every corner of the world for the price he or she prefers and from the company he or she wishes to do business with. He or she can reach every company with limited effort and limited costs. As a result, the consumer has many more

¹⁹ <<http://www.twitter.com>>.

choices and moreover, he or she can make his or her choices on a more informed basis than before, because of the possibility to easily compare products. Enlarging the environment of business is also interesting for businesses; there are more potential customers than ever before and these potential customers can be easily reached in a short period of time, against minimal cost. As a result of the enlargement of scale, it becomes less transparent who's who and what the consumer can expect from the companies he is potentially buying products from. Another problem with online marketing tools is the influencing of the consumer's behaviour. With profiling and pro-active advertising, the consumer does no longer have to think for himself. The products he might want to buy will be directly presented to him (e.g. by spam or pop-ups), since his preferences are known to the companies he is buying from²⁰. The only way that he is offered something else than his preferences indicate is the 'others bought' indicator. A website can show that other customers that bought the similar product as the customers also bought products X, Y and Z.²¹ In the long run this limits the development of the customer's purchasing behaviour, since there is no longer a need to make choices; they are made for the customer.

No matter which marketing tools are used, it is necessary to create consumer awareness about the methods used by companies. Comparisons, reviews, bots and microblogs can mislead the consumer into buying specific products. Awareness can re-adjust the balance of power in favour of the consumer. Even though comparing prices gives the consumer more power and more choices, there is always the danger that the informed decision he makes is not that informed. Is the tool for example used for profiling? Is the advice provided truly personal? Are only companies paying for advertisement included in the comparison? Are the reviews truly provided by customers? Or can a company boost the reviews? If the consumer is aware that he is manipulated or triggered into buying products, he can act upon it.

²⁰ It looks like the presentation of the products is personalised as well, not only directly targeted, since the companies know personal preferences. Nevertheless, the products are not offered fully personal, since personal preferences are constructed as a group profile.

²¹ See for example Amazon.com and Apple I-tunes.

Transparency is required to make fully informed purchases. This transparency requires a specific focus in an online environment, because there are specific groups that might need special attention with regard to consumer manipulation. Children, teenagers and elderly not acquainted with the 'dangers' of the World Wide Web are weaker targets. The Internet should not restrict the customer more to make fully informed decisions than they should in the offline world. As said, it might even become illegal to promote in a way that damages the trust relationship between the consumer and the online world. Even from a marketing point of view, it is important that consumers have trust in the organisation they deal with. If that relationship is damaged, there is no way the consumer will come back for more unless the company is the sole supplier.²²

5. To what extent should consumers be protected?

Because consumers are influenced and reached in a more effective way via the Internet, and the companies involved are less transparent, the question is to what extent they need protection. Protection is primarily offered by legislation. An interesting question is whether the scope of the term 'consumer' has changed during the last years. It is clear that the position of consumers is subject to changes. This might imply that the average consumer of the 1990s is not comparable to the average consumer at present.

In the case of contracting parties, parties will want to know with whom they are contracting, the so-called personal recognizability.²³ This recognizability can be essential to judge the trustworthiness of a party and to find out if the contracting party has competence to close a contract. Of course, for companies or suppliers this certainty is of importance, because they want to restrict the risks they take in doing business. On the other hand there is the interest of the consumer to trust the company that goods or services will be delivered correctly and

²² However, it should be noted that in the case of a sole supplier there are specific rules and restrictions related to abuse of a dominant position (e.g. Article 82 of the EC Treaty).

²³ S. van der Hof, *Internationale on-line overeenkomsten*, dissertation, Den Haag: SDU Uitgevers 2002, p.26.

according to the contract. However, it might be difficult for consumers to make a good judgement and the economic impact of a 'wrong' transaction might be much larger for a 'small' consumer than for a 'big' company. Therefore consumer protection is set up in legislation if problems occur. In order to discuss this special protection it is first necessary to have a look at what a 'consumer' is.

At the EU level, several Directives have been adopted in which consumer protection is at stake. For the purposes of this article, we restrict ourselves to some Directives on online contracting. The first is the 1997 Distance Selling Directive,²⁴ where a consumer is defined as follows:

- (2) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;

The Directive on Electronic Commerce²⁵ in article 2(e) uses the same definition, except that the part "in contracts covered by this Directive" is not included. The Unfair Commercial Practices Directive²⁶ states:

For the purposes of this Directive:

- (a) 'consumer' means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;

The definitions are in essence similar, stating that a consumer is a natural person acting for personal purposes. However, even in case law of the European Court of Justice, there is sometimes a broad and sometimes a narrow interpretation of the term 'consumer'. In relation

²⁴ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

²⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178.

²⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

to the EEX Treaty²⁷, the Court uses a restrictive interpretation, implying that a professional party cannot be a consumer at the same time, mainly because the EEX evidently has an aversion to the competence of courts of the *forum actoris*.²⁸ This competence should be restricted to a limited number of cases, like the consumer that, as the economically weaker and legally less experienced contracting party, needs protection.²⁹ A possible less black and white distinction between consumer and professional is not likely to lead to a more flexible position of the Court.³⁰ However, it should be noted that this experience comes from a perspective related to the EEX Treaty, thus it (only) counts in cross-border contracting.

In practice, it often appears that judges make their decision on the own responsibility of consumers from a perspective of the 'average consumer'. It can be questioned what exactly is meant by this term. An average consumer is a consumer who is reasonably well-informed and reasonably observant and circumspect according tot the ECJ³¹. Is the scope of this term subject to changes?

As said, the consumer is traditionally considered to be the weaker party, which is also expressed in the ECJ judgement mentioned above. Because of this relative weakness, protection is needed. Even though the power position of consumers might be subject to changes, the idea of relative weakness still exists. This can, for example, be seen from the initiative of the EU Directorate-General for Health & Consumer Protection to launch a powerful new enforcement network that targets "cross-border scams such as phoney lotteries and bogus holiday clubs".³² "The Enforcement Cooperation Regulation"³³ sets up an EU wide

²⁷ "Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters", (EEX Treaty or European Execution Treaty).

²⁸ ECJ Shearson, case C-89/91, Jur EG 1993 p.I-139, at 17.

²⁹ Idem, at 18.

³⁰ Compare: S. van der Hof, Internationale on-line overeenkomsten, dissertation, Den Haag: SDU Uitgevers 2002, p.29.

³¹ Directorate-General for Health & Consumer Protection, "The Unfair Commercial Practices Directive: New laws to stop unfair behaviour towards consumers", Luxembourg: Office for Official Publications of the European Communities, 2006, p.8.

³² Directorate-General for Health & Consumer Protection, "Consumers: EU clamp-down on cross border fraudsters", Press Release Brussels 27 February 2007, IP/07/253, available at:

network between enforcement bodies to tackle crooks who rip off victims in one country but operate in another. It also establishes minimum standards for national enforcement authorities.”³⁴ This initiative can be seen as an addition to the Unfair Commercial Practices Directive, which forms the basis of consumer protection against unfairly operating companies and suppliers. The aim of this Directive was to clarify consumers’ rights and to simplify cross-border trade.³⁵ The Directive uses the notion of the average consumer in the case that commercial practices are directed at a particular group of consumers, in which case an average member of that group is the benchmark. “The average consumer, as interpreted by the European Court of Justice, is *reasonably well-informed and reasonably observant and circumspect*, taking into account social, cultural and linguistic factors.”³⁶ This is the benchmark that applies in general. However, extra protection is offered to vulnerable consumers, such as children or elderly people. This protection goes quite far, because “traders cannot evade the unfairness rule by specific practices that would only fool particularly vulnerable consumers even if those practices cannot be proven to target that group.”³⁷

The Internet also has positive influences on the power of consumers and this may influence the interpretation of the ‘average consumer’. The above-mentioned comparison websites for example, may give consumers the opportunity to find out what the price of a certain product is. If all suppliers have the same price except one, which offers the same for a much lower price, it may be obvious that the fairness of the goods or the proper performance of the contract can be questionable. This information is available to all consumers with access to an

<<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/253&format=HTML&aged=0&language=EN&guiLanguage=en>>.

³³ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. The network started its operations end of 2006, but was officially launched by Commissioner Kuneva on 28 February 2007. (See: <http://ec.europa.eu/consumers/prot_rules/admin_coop/index_en.print.htm>).

³⁴ Supra note 28..

³⁵ Directorate-General for Health & Consumer Protection, “The Unfair Commercial Practices Directive: New laws to stop unfair behaviour towards consumers”, Luxembourg: Office for Official Publications of the European Communities, 2006, p.8.

³⁶ Idem, p.10.

³⁷ Idem, p.17.

Internet connection; nowadays a very large majority of the population (at least, in the Western world). Does this mean that an average consumer would not do business with such a doubtful company? And if so, does this mean that the consumer should be less protected by consumer protection measures?

With the applicable directives and forthcoming regulatory initiatives, consumers have a wide range of protection measures at their disposal. These measures require relatively much effort from businesses to apply to standards and to take risks in their transactions. Obviously, when a group of consumers decides to return delivered goods within seven days *en masse*, they can create a power position against a supplier.³⁸ With the help of technological devices, such as the Internet, organised interest (pressure) groups may be able to set up certain actions to boycott products or companies. In relation to this, it can be questioned how far consumer protection may go and if the burden is not too much at the business side. However, it still appears that consumers are not sufficiently aware of risks and facilities created by online environments, thus, at least for the moment, protection is needed. It also appears that the scope of the term ‘consumer’ has not changed in the definitions in legislation. However, since this term is subject to interpretation by judges, the considerations on the scope of the definition might be influenced by changes in practical situations. The next section will provide some points for attention. If these recommendations are fulfilled, future developments may call for reconsideration of the consumer protection regulatory framework.

6. Recommendations

This section discusses some points of interest that are necessary to take into account when considering shifting powers between consumers and suppliers in relation to technological development. Three main points that will be touched upon are transparency, legal limitation, and consumer awareness.

³⁸ This right of withdrawal is provided by Directive 97/7/EC in article 6. The consumer can withdraw the contract within seven days without penalty and without giving any reason.

The first point is transparency. The practical examples mentioned in this article show that most situations where consumers can be considered to be 'victims' or at least weaker parties are created because of lack of transparency. This transparency can be twofold; on the one hand, there is a lack of transparency with regard to the persons behind a website or content on message boards (the actors), and on the other hand, there is a lack of transparency with regard to reliability of information and trustworthiness of websites (the content). The legislators are already addressing the first part. For example, prohibition of pretending to be another person than you really are and initiatives to enforce this regulation, also in cross-border transactions, shows the attention of the EU to this problem. The prohibitions relate to the companies or persons as such, who control or own websites, meaning that for consumers it has to be clear who they are dealing with. But the intention is to let the prohibitions also relate to messages in polls or on message boards and comparative websites. In that case, it would not be allowed to post positive comments or reviews of your own products.

The second part is more difficult. The reliability of website content is sometimes difficult to assess without some specific knowledge about the topic in which you are searching information or products. If you have some knowledge, this will help in where to search and to know which companies or institutions have a good reputation. Otherwise, there might be help of trust marks on websites. However, also then you have to know where the trust mark comes from and that it is not some sign made by the owner of a website himself. To regulate reliability by means of legal instruments is difficult.

This brings us to the second focus point: legal limitation. Legislation is a helpful tool to create clarity and consistency in online marketing issues and provides the protection for the weaker party (the consumer). Given the fact that the Internet is an online environment with legal borders in marketing issues, it should be clear to the consumer what legal rules are binding for him. Since the legal field is difficult to comprehend for the 'average' consumer, the

companies have the burden to inform the consumer about their rights and obligations. In any case, the consumer is subject to the laws of the country he is living in. The EU legislation on, among others, cross-border trade makes it easier for the consumer to buy products online from abroad. In case of problems, the EU rules apply throughout a large region (17 EU member states). In case products are bought from outside the EU, for example the US, the same rules for consumer protection apply, but they are difficult to uphold.

In this respect, legal limitation is important. Which practices are allowed and which are not has to be subject of clear legislation. Therefore, it would be favourable to reconsider current legislation and to examine whether updates are needed with respect to online practices. A good example is the EU initiative to amend the Unfair Practices Directive in order to prohibit phoney promotions. With a focus on consumer protection, improvement can still be achieved.

The final focus point is consumer awareness as discussed in section 3 of this article. As seen, creating awareness is important from different perspectives. First, awareness has to form a sufficient opposition against companies that misuse the Internet to sell their products by unfair means. Consumers have to know how they can judge reliability of websites and how to make a good decision in trusting online shops. If there is lack of awareness of technical possibilities offered to businesses by the Internet to conceal identities and to gather information, consumers will remain weak targets of unreliable companies. Obviously, it would be best if no consumer protection were needed, but that is unfortunately unrealistic to ever be the case.

The second reason why awareness has to be created amongst consumers is the risk that consumers are restricted in their autonomy. The Internet seems to be an inexhaustible source of information. However, if consumer profiles are made and the information provision of consumers is manipulated, e.g., by search engines or based on the earlier preferences, there will only be a small piece of the information that really reaches the consumer. As a result,

each time that information or a product is found, this will be a confirmation of earlier, or presumed, preferences. This might restrict the freedom of choice, because of a lack of available choices, and therewith autonomy of consumers.

7. Conclusion

This article provides an overview of certain methods related to the Internet, in particular comparison websites and markufactoring techniques, which are being used by companies to market their products. Related to this e-commerce, special attention was paid to the power position of consumers using the Internet. It appeared that the Internet offers great opportunities for consumers to compare products and prices and to broaden their scope of available products. However, problems arise with regard to the reliability of comparison websites and review blogs. Other concerns regard buddy bots and markufactoring techniques.

Current legislation protects consumers, because they are still considered to be the weaker party in transactions. Yet, this weak position can be subject to changes, meaning that the scope of the definition of a 'consumer' or the 'average consumer' may be altering. Even though the definitions in legislation remain the same, judges can apply different standards in practice. Obviously, well-informed, as used in the definition of the ECJ, has another meaning today than it had ten years ago, when the Internet was not that common as a source of information yet.

Whereas the advent of comparison websites may trigger the assumption that a power shift is occurring, in that consumers are becoming stronger through increased information and choice, we conclude that there is no evidence for such a power shift. On the contrary, the consumer is still the weaker party as long as the facilities of the Internet are exploited by businesses through manipulation of comparison websites and by new marketing approaches like markufactoring.

Therefore, consumer protection legislation is still needed. However, some focus points may help to prevent unreasonable shifts in power between consumers and businesses. Three main points are transparency, legal limitation, and creating awareness. One specific concern that needs attention when applying these focus points is protection of the autonomy of consumers. Restricted availability of information because of profiling or repeated confirmation of earlier (alleged) preferences may result in a *feeling* of freedom and unlimited access to information, whereas in fact consumers are being restricted in their choices.